

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Nov 28 11 56 AM '97 Washington, D.C. 20554

FCC 97M-195

80128

In Matter of DISC) WT DOCKET NO. 94-147
)
 JAMES A. KAY, JR.)
)
 Licensee of one hundred fifty two)
 Part 90 licenses in the)
 Los Angeles, California area.)

O R D E R

Issued: November 25, 1997 ; Released: November 26, 1997

This is a ruling on an Opposition To Deposition that was filed on November 13, 1997, by a non-party, Christopher Killian ("Killian"). On November 6, 1997, the Presiding Judge signed a subpoena for Killian's deposition¹ to be taken at the request of the Bureau at a Federal Building in Los Angeles on December 10, 1997. The basis for the Opposition is an expressed concern by Mr. Killian that his examination by counsel for James A. Kay, Jr. ("Kay") may be an oppressive "fishing expedition." In the alternative to excusing Killian from being deposed, the Opposition requests protective relief (1) that Kay's attorneys be precluded from asking questions or (2) that Kay's attorneys be limited to cross-examining on questions asked by the Bureau and (3) that the deposition commence at 9 a.m. and conclude at 12 noon.

On November 20, 1997, the Bureau filed its Response To Opposition To Deposition wherein the Bureau argues that there is no basis not to go forward with the Killian deposition and the issue was framed for a ruling by the Presiding Judge. Kay has not submitted a responsive pleading to the Presiding Judge within the authorized time. 47 C.F.R. §1.315(b)(1)(2) (pleading cycle closes 14 days after service of notice to depose). The Bureau asks that Kay's counsel be strictly limited to cross-examination on the subject matter of the Bureau's examination [Section 1.318(d)(1) (deposition examination)] and further argues that any further relief should be sought by Killian under Section 1.319(c) (right to object at deposition to oppressive questions). Killian has offered as a validation of his concern, a copy of the deposition of his wife, Deborah Killian, taken on September 17, 1996, in a state civil action styled James A. Kay, Jr. v. Harold Pick. However, Killian does not refer to any specific portions of the deposition. A cover to cover review will not be made by the Presiding Judge to search for oppressive questions.

¹ A Notice To Depose Christopher Killian was mailed by the Bureau on November 6, 1997. The Bureau advises that the subpoena is in the process of being served. There has been no question raised with respect to the adequacy of notice.

And it is most unlikely that the same attorney in the state action will ask the questions of Killian in this case. Kay is represented by Washington, D.C counsel who have entered appearances, who are familiar with the case, and who will assumedly be in Los Angeles at the deposition in representing Kay's interests.² To date, there has been no showing of abusive or oppressive questioning or other misconduct on the part of Kay's present counsel in this proceeding and none is expected. Therefore, no basis has been shown to excuse Mr. Killian from the deposition. However, there will be limited protective relief afforded which applies to all counsel in all depositions. See 47 C.F.R. §1.315(c) (protective order may be sua sponte) and fn. 2, supra.

Also, Kay has filed an unrelated Petition for Institution of License Revocation Proceedings asking for Commission proceedings against licenses of Killian or Killian affiliates (Carrier, Nextel). Those Killian licenses have no relevance in this case. Kay is not authorized to ask questions about those Killian related licensees at the Killian deposition noticed by the Bureau in this case. Killian may only be asked questions by Kay which relate to the issues in this case in connection with Kay's cross examination to the questions asked by the Bureau counsel. 47 C.F.R. §1.318(d).

Accordingly, IT IS ORDERED that the Opposition To Deposition filed by Christopher Killian on November 13, 1997, IS DENIED in part and the protection sought IS GRANTED in part.

IT IS FURTHER ORDERED that the deposition of Christopher Killian will go forward as scheduled on December 10, 1997 in Los Angeles, CA in accordance with the instructions set forth above.

FEDERAL COMMUNICATIONS COMMISSION³



Richard L. Sippel
Administrative Law Judge

² It is the Bureau's deposition and the Bureau is in control as to its scope. Kay's counsel is permitted to ask cross-examination questions that are limited to the subjects of the questions asked by Bureau counsel. Both parties should be attentive to the needs and comfort of the witness and avoid delay or argument. There will be no time limit set to conclude the deposition because it cannot be determined at this time how questions will be asked and answered. But based on the representation in the Bureau's List of Contemplated Witnesses that Killian is involved in land mobile business in the Los Angeles area and would have knowledge as a competitor of Kay (as contrasted with a more knowledgeable business associate), the deposition of Christopher Killian should not take excessively long to complete.

³ Courtesy copies of this Order were faxed or e-mailed to counsel on date of issuance.